88-130

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WESTERN UNION CORPORATION,
Appellant,

v.

INDIANA DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Court of Appeals of Indiana

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

May a State, consistent with the Commerce Clause of the United States Constitution, divide interstate telegraph services into artificial intrastate and interstate segments and impose upon the income derived from interstate telegraph services a tax that is unapportioned and that results in multiple state taxation?

RULE 28.1 LISTING

Listing of Affiliates

Arlington Properties, Inc.
B. S. LeBow, Inc.
Bensow, Inc.
BL Holdings, Inc.
Brigham's Inc.
Brooke Capital Corp.
Brooke General Corp.
Brooke Partners L. P.
BSL Family Partners Limited Partnerships
BSL Partners
C. P. Yacht Charter Limited
Candida Charter Ltd.
COM Products Inc.
Copystatics, Inc.
GTB Florida Limited Partnership
L Aviation, Inc.
L Holdings Inc.
LCPW Realty, Inc.
LeBow Industries, Inc.
LHR Realty Corp.
Liggett Group, Inc. and Subsidiaries
MAI Basic Four, Inc. and Subsidiaries
R. K. Computers, Inc.
Sapphire Sailing, Inc.
Sapphire Water Sports, Inc.
Sapphire Yachts, Inc.
SCLB, Inc.
South Dakota Gold Company, Inc.
Stefaren Yacht Limited
The New Sarah Coventry Ltd.
United States Gold Corp.
United States Gold Corp. of Delaware
V. I. Candida, Inc.
V. I. Marine Holdings, Inc.
Wobel, Inc.

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WESTERN UNION CORPORATION,
Appellant,

v.

INDIANA DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Court of Appeals of Indiana

JURISDICTIONAL STATEMENT

Appellant, Western Union Corporation ("Western Union"), formerly The Western Union Telegraph Company, appeals from the final judgment and opinion of the Court of Appeals of Indiana issued on August 11, 1987, made final by the Supreme Court of Indiana's denial of transfer issued on April 22, 1988. In the judgment and opinion appealed from, the Court of Appeals of Indiana sustained the imposition of the Indiana Gross Income Tax upon the income of Western Union against the charge that this tax violates the Commerce Clause of the United States Constitution.

OPINIONS BELOW

The opinion of the Court of Appeals of Indiana, First District is reported at 511 N.E.2d 481, and is reprinted in the appendix hereto ("App.") at 1a.

The Denial of Petition for Rehearing to the Court of Appeals of Indiana is unreported and is reprinted at App. 24a.

The Denial of Petition for Transfer to the Supreme Court of Indiana is unreported and is reprinted at App. 25a.

The Findings of Fact, Conclusions of Law and Judgment of the Shelby Circuit Court (O'Connor, J.) are unreported and are reprinted at App. 13a.

JURISDICTION

On January 14, 1985, Western Union filed suit in the Shelby Circuit Court in Indiana for a refund of taxes paid on income derived from the provision of Telex and TWX services, and for sales tax paid. Western Union claimed the income was exempt from taxation by Indiana pursuant to section 6-2-1-7(a) (now section 6-2.1-3-3) of the Indiana Code, which exempts from taxation income derived from business in interstate commerce "to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution." App. 34a. The Shelby Circuit Court (O'Connor, J.) agreed with Western Union and entered judgment in its favor on August 8, 1986. App. 13a.

The Indiana Department of Revenue appealed to the Court of Appeals of Indiana and, on August 11, 1987, the Court of Appeals reversed the circuit court's decision on the income tax issue. App. 9a. The sales tax question is no longer part of this case. The Court of Appeals of Indiana denied Western Union's timely petition for rehearing on September 29, 1987. App. 24a. Western Union then filed a timely petition for transfer to the Supreme Court of Indiana. The Supreme Court of Indiana denied Western Union's petition on April 22, 1988, rendering final the judgment of the Court of Appeals of Indiana. App. 25a. On July 11, 1988, Western Union

filed its notice of appeal with the Court of Appeals of Indiana. App. 26a. The jurisdiction of this Court over the appeal is based on 28 U.S.C. § 1257(2).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides in pertinent part that "The Congress shall have Power * * * to regulate Commerce * * * among the several States * * *."

The Indiana Gross Income Tax, Ind. Code Ann. § 6-2.1-2-2 (Burns 1987), provides in pertinent part that "(a) an income tax, known as the gross income tax, is imposed upon the receipt of: * * * (2) The taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." The remainder of that statute is set forth at App. 33a.

The Indiana Gross Income Tax exemption for interstate commerce, Ind. Code Ann. § 6-2.1-3-3 (Burns 1987), provides that "Gross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution." App. 34a.

* * * *

HOW THE FEDERAL QUESTION WAS RAISED

Western Union raised the claim in the trial court that the Indiana tax was being improperly and illegally applied to its interstate income. The trial court agreed and concluded that the activity giving rise to the income was "one continuing communication or transaction in interstate commerce". App. 21a. In the Court of Appeals of Indiana, the state framed the issue as: "[w]hether the interstate commerce exemption precludes

Indiana taxation of Western Union's activities." App. 4a. Western Union continued to assert "that the taxes herein assessed and billed by defendant upon gross recepts [sic] from interstate commerce clearly . . . constitute a regulation of and a burden on that interstate commerce . . . in conflict with Article I, § 8 of the United States Constitution." Brief of Western Union to the Court of Appeals of Indiana at 39. The Court of Appeals declined to apportion the tax to preclude the possibility of unconstitutional double taxation, and instead found a functional division among the services provided by Western Union. The court declared some functions to be completely intrastate and that the entire income from those functions was therefore subject to taxation by Indiana. App. 9a.

STATEMENT OF THE CASE

I. Western Union

Western Union is a common carrier that provides a network for the transmission and receipt of telecommunicated written messages throughout the world. Such messages may be sent by subscribers over the network to locations in other states, in other countries, or within a single state. The telecommunication services provided by Western Union include, among other things, two types of teletypewriter exchange service, Telex and TWX.[1] Access to Western Union's network allows a Telex or TWX subscriber, through the teletypewriter, to communicate almost instantaneously with another subscriber anywhere in the world. A message is transmitted by typing the message to be sent into the teletypewriter equipment at the point of origination. The message then travels

[1] The differences between the two systems is the speed of the operation; Telex transmits 70 words per minute and TWX transmits 90 words per minute.

through lines and switches until it reaches its destination where it is printed out on the receiver's teletypewriter machine.

In providing its interstate and international service to its Indiana subscribers, Western Union unbundles its charges for equipment, facility, access, and usage and lists them separately on each bill. These charges are separately set forth whether or not a subscriber uses the network solely for interstate communications. The equipment charge is a fee paid by the subscriber for the use of the teletypewriter. The facility charge is the fee paid, on a per mile basis, for linking an Indiana subscriber to Western Union's nearest exchange in Indiana.[2] The access charge is the fee paid by the subscriber for access or connection to the entire interstate/international network. The usage charge represents the amount billed to a subscriber for the time elapsed for messages sent over the Western Union network.[3] The equipment, facility, and access charges are fixed monthly rates, but the usage charge necessarily varies with the volume of message transmissions.

The Indiana Department of Revenue (hereafter "Indiana") has imposed upon one hundred percent of the income Western Union receives from the facility, access and equipment charges, its state gross income tax, which is a tax upon "gross income derived from activities or businesses or any other sources within Indiana . . .". App. 33a, Ind. Code Ann. § 6-2.1-2-2 (Burns 1987).

In conjunction with the imposition of this tax, however, is a provision permitting an exemption for interstate business:

> [g]ross income derived from business conducted in commerce between the state of Indiana and either

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[2] Subscribers within 5 miles of the exchange are not billed for the facility charge.

[3] Indiana has conceded that ninety percent of the usage charge is income from interstate commerce and therefore not taxable.

> another state or foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution.

App. 34a, Ind. Code Ann. § 6-2.1-3-3 (Burns 1987). This exemption should apply to the taxation of the interstate service provided by Western Union. The statute by its terms applies the exemption within the parameters set by the United States Constitution.

II. The Litigation Below

On January 14, 1985, Western Union filed a complaint in the Shelby (Indiana) Circuit Court seeking a refund of corporate gross income taxes paid from 1974 through 1981 and a refund of sales taxes paid from 1975 through 1981. App. 3a. The latter claim is no longer in issue. On March 17, 1986 the parties stipulated the facts and the authenticity of certain documents. App. 28a. A one-day bench trial was held on March 24, 1986.

On August 8, 1986, the Shelby Circuit Court issued its Findings of Fact, Conclusions of Law and Judgment. App. 13a. The trial court concluded that the "sending of a Telex or TWX message from a subscriber located in Indiana and received by a subscriber in a state other than Indiana is one continuing communication or transaction in interstate commerce." App. 21a. The court therefore concluded that the stipulated 90 percent of Indiana gross income taxes based upon gross income received by Western Union for Telex and TWX service for the years 1974 through 1980 was unlawfully billed and collected in violation of the statutory exemption for revenue derived from interstate commerce. App. 22a. In its findings the court determined that "[e]ach segment or part of a Telex and TWX system is necessary, integral and essential for the systems to work including Facility, Equipment, Access, Switch Exchanges and the lines or means to transmit the communications." App. 20a.

Indiana appealed the trial court's decision to the Court of Appeals of Indiana. On August 11, 1987 that court issued an opinion reversing the judgment of the circuit court as to the gross income tax issue and affirming the judgment as to the sales tax issue. The Court of Appeals determined that Western Union's integrated, interstate system could be segmented and proceeded to segment Western Union's business activity solely by reference to the charges billed to its Indiana subscribers. The court concluded that the equipment, access and facility charges would not be subject to multi-state taxation and, therefore, that imposition of the gross income tax on those charges was not an undue burden on interstate commerce. App. 9a.

Western Union filed a timely petition for rehearing on August 28, 1987. That petition was denied on September 29, 1987. App. 24a. Western Union then filed a timely petition for transfer to the Supreme Court of Indiana which was denied on April 22, 1988. App. 25a. A notice of appeal to this Court was timely filed by Western Union with the Court of Appeals of Indiana on July 11, 1988. App. 26a.

THE QUESTION PRESENTED IS SUBSTANTIAL

In its last term the Court noted probable jurisdiction in a case raising the issue whether the state of Illinois may tax gross charges for interstate telecommunication activity within the limitations set forth in the Commerce Clause on a state's ability to tax activity in interstate commerce. *Goldberg v. Sweet*, *prob. juris. noted*, 56 U.S.L.W. 3568 (U.S. Feb. 23, 1988) (No. 87-826).[4] This case raises the related issue whether Illinois' sister state, Indiana, may tax the gross *income* received by a provider of telegraph services in interstate commerce. As in *Goldberg v. Sweet*, the Court is called upon to consider the

[4] The Court also noted probable jurisdiction in *GTE Sprint Communications Corporation v. Sweet*, *prob. juris. noted*, 56 U.S.L.W. 3568 (U.S. Feb. 23, 1988) (No. 87-1101).

bounds of the states' taxing authority as applied to advancing interstate technology. Unlike *Goldberg v. Sweet*, this case raises the issue whether ad hoc application of a state tax scheme on interstate commerce may properly be upheld when the taxing authority asserts that the unitary, integrated, interstate telegraph system can be functionally divided into intra- and interstate segments, thereby avoiding altogether application of the Commerce Clause's limitations on state taxation of interstate commerce.

Western Union provides Telex and TWX teletypewriter exchange service to its customers in the fifty states and access to many foreign countries as well. Both Telex and TWX are telegraph services which enable subscribers in Indiana or elsewhere to transmit written messages to Telex and TWX stations throughout the world. Western Union's international telegraph service enables subscribers to communicate almost instantaneously with other subscribers almost anywhere in the world.

From 1974 to 1981, the years relevant to the litigation below, Western Union was the sole operating domestic telegraph company in the United States. During that period, ninety percent of the Telex and TWX usage paid for by Indiana subscribers was for communications to a state or country outside of the state of Indiana. App. 28a.

The Court has long recognized that telegraph service between the states, which now includes Telex and TWX services, is interstate commerce. *Telegraph Co. v. Texas*, 105 U.S. 460 (1882); *Western Union Telegraph Co. v. Foster*, 247 U.S. 105 (1918). Therefore, before any state may impose a tax upon the income derived from this interstate activity, it must be determined whether taxation of that income is valid under the Commerce Clause of the United States Constitution.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, *reh'g denied*, 430 U.S. 976 (1977), the Court held that a

state tax on interstate commerce is valid under the Commerce Clause only if (1) there is a substantial nexus between the taxing state and the taxed activity; (2) the tax is fairly apportioned so that it is limited to that portion of the interstate activity occurring within the taxing state; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to services provided by the taxing state. 430 U.S. at 279.

The *Complete Auto Transit* requirements were intended to ensure that interstate commerce was not burdened by any state's imposition on a taxpayer of more than its "just" share of the tax attributable to commerce among the states. 430 U.S. at 279. The Indiana gross income tax fails at least two parts of the *Complete Auto Transit* test. First, the tax is unapportioned. Indiana has taken three elements of Western Union's integrated, interstate service, designated them as local activities, and taxed one hundred percent of the income from those activities. Second, the imposition of the Indiana gross income tax on Western Union's service unconstitutionally discriminates against interstate commerce because of the actual and potential risk of double taxation which places a burden on interstate commerce that is not placed on the intrastate commerce.

When the Court of Appeals of Indiana reversed the trial court and upheld the Indiana tax, it did not apply any of the standards established by this Court in *Complete Auto Transit*. Rather, the Court of Appeals looked solely to the bill received by subscribers, not to the nature of the activity taxed, and erected artificial "functional" divisions in an integrated, interstate communications network. Because the Court of Appeals erroneously concluded that Western Union's method of charging customers could be equated with a geographic division between intrastate and interstate commerce, the court failed to apportion the tax. In the absence of proper apportionment the tax provided the framework for both actual

and potential double taxation of the same income, and thereby imposed the discriminatory impact proscribed by *Complete Auto Transit.*

The Court should note probable jurisdiction to establish the constitutional limitations of a state's division of inherently interstate activity for the purposes of state taxation and to establish the constitutional prohibition against non-apportioned taxation of interstate telecommunications.

I. The Imposition of the Indiana Gross Income Tax upon the Income Western Union Derives from its Telex and TWX Operations Violates the Commerce Clause

A. *The Tax is Applied to Interstate Activity*

Western Union derives its income from the provision of telegraph services, an inherently interstate activity. The parties stipulated that for the years in issue ninety percent of Western Union's income from usage by Indiana subscribers was attributable to interstate telegraph service. App. 31a. Despite the interstate character of this activity, the Court of Appeals of Indiana did not treat it as such. The court instead concluded Western Union's telegraph service was divisible and that three portions of Western Union's Telex and TWX services were wholly intrastate. Therefore, the court concluded that those activities could be carved out from the interstate activity and that Indiana could tax one hundred percent (100%) of that income. The court's decision was not based on considerations of the nature of the interstate network, nor on any apportionment of the tax. Instead, the court looked only to Western Union's method of billing to divide income from interstate activity into four segments, three of which were deemed intrastate. App. 9a. The fact that Western Union has unbundled its charges on a subscriber's bill into equipment, facility, access and usage charges, however, is hardly determina-

tive of the intra- or interstate character of the activity taxed.

This artificial division of Western Union's income ignores both the unitary nature of Western Union's business in providing these telegraph services, and the integrated nature of the services themselves. While it may be appropriate to separate functions of a business for tax purposes when those functions are independent and unrelated, *see, e.g., Tyler Pipe Industries v. Washington Department of Revenue*, 483 U.S. ——, 107 S. Ct. 2810 (1987), it is not proper for a state to carve out for one hundred percent (100%) taxation income derived from a *single interstate service. See Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 166, *reh'g denied*, 347 U.S. 931 (1954) ("[A] tax imposed on a local activity related to interstate commerce is valid if . . . the local activity is not such an integral part of the interstate process . . . that it cannot realistically be separated from it.").

In *Tyler Pipe*, this Court held it was proper for the state of Washington to impose an unapportioned tax on a company's instate wholesaling activities where that activity was separate and distinct from the taxpayer's manufacturing activities conducted in another state, and where no other state had jurisdiction to tax the wholesaling activity. 107 S. Ct. at 2822. The telecommunication services provided by Western Union are unlike the separate wholesaling and manufacturing functions engaged in by the taxpayer in *Tyler Pipe*. Western Union's telecommunication activity within Indiana is not separate and distinct from Western Union's telecommunications network in other states. The provision of Telex and TWX services, where a telegraph message is transmitted from the originating teletypewriter to the receiving teletypewriter, cannot be separated into wholly intrastate activities. Each telecommunication is a single instrumentality of interstate commerce, no part of which can be wholly taxed by one state.

The income Western Union derives from the provision of its telecommunications service is from a unitary business, just as the income the taxpayer derived from its oil and gas exploration, production and refining functions was held to be from a unitary business in *Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207, 224 (1980). *See also Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980). In *Exxon*, the taxpayer argued that its out-of-state oil exploration and production activities were discrete functional operating departments and that the income from those activities was properly allocated to their situs states for taxation and excluded completely from taxation by Wisconsin. The Court disagreed and held that, because the activities were part of a unitary business, Wisconsin could properly tax an apportioned amount of the income from those activities. 447 U.S. at 224.

Similarly, in *Mobil*, the Court looked to the "underlying economic realities" of the taxpayer's business, and found that the taxpayer's dividend income received from its subsidiaries and affiliates doing business abroad was part of the taxpayer's unitary business income. 445 U.S. at 440. The Court was not persuaded in *Mobil* by contentions that the taxpayer's holding company function was a separate business from its sale of petroleum function and, therefore, that the income from the former should be excluded totally from taxation by Vermont. *Id.*

In the present case, Indiana has done what the Court would not allow in *Exxon* and *Mobil*. Indiana has separated and labelled as independent what is actually a portion of a unitary business. Although Indiana's motivation for the separation is to tax the entire income, while the taxpayers in *Exxon* and *Mobil* were trying to *avoid* being taxed on certain items, the principle is the same. Where income is derived from a unitary interstate business, the proper and constitutional method of taxation is to apportion that income among the states where

that business is conducted. Indiana has improperly allocated to itself for taxation entire portions of Western Union's income that must be apportioned among all the states in which Western Union operates. *See Mobil*, 445 U.S. at 444 ("Taxation by apportionment and taxation by allocation to a single situs are theoretically incommensurate . . ."); *see also Exxon*, 447 U.S. at 224.

Although various aspects of Western Union's unitary business can be separately identified, this does not change the interstate nature of its telecommunication services.[5] *See, e.g., Ealey v. Bureau of Revenue, New Mexico*, 89 N.M. 160, 548 P.2d 440 (1976); *Idaho Microwave, Inc. v. Federal Communications Commission*, 352 F.2d 729 (D.C. Cir. 1965);[6] *Ward v. Northern Ohio Telephone Co.*, 300 F.2d 816, 819 (6th Cir.), *cert. denied*, 371 U.S. 820 (1962). In *Ward*, the Sixth Circuit found that a telephone company which leased lines to a radio station for broadcast was engaged in interstate communication and therefore subject to FCC regulations, even though the company's property and the leased wires were located wholly within a single state. According to the Sixth Circuit, "the contract or leasing arrangement may be for

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[5] Further support for the proposition that all aspects of the telegraph service are integral parts of an interstate system is found in *In the Matter of American Telephone & Telegraph Co.*, F.C.C. Docket No. 15011, May 12, 1965, 38 F.C.C. 1127. The Federal Communications Commission found that charges for teletypewriter station and supplemental equipment are charges over which it, not the states, has regulatory jurisdiction.

[6] In *Idaho Microwave* the court held that the FCC has not exceeded its authority to regulate certain television microwave services. The court cited *Ward v. Northern Ohio Telephone Co.* to find that the facility in question was a link in the continuous uninterrupted interstate transmission of television signals. "Thus though Idaho Microwave's physical facilities are located within Idaho it performs an interstate communication service when it takes part in the transmission of signals from Utah to Idaho." 352 F.2d at 729.

a wire service which begins and ends within a single state. The complete transmission, however, is an interstate communication and is therefore subject to legislation by Congress under the commerce clause." *Ward*, 300 F.2d at 819.

In *Ealey v. Bureau of Revenue*, the court held the income earned by a taxpayer who typed messages into Western Union's telegraph network exempt from New Mexico's gross receipts tax. That income, according to the court, fell within the state's statutory exemption for income earned by transmitting messages in interstate commerce. *Ealey*, 89 N.M. at 169, 548 P.2d at 441. The court so held even though the taxpayer's services were performed wholly within New Mexico and involved nothing more than typing messages into the telegraph equipment at its source. *Id.*

The various aspects of Western Union's telegraph services are as inseparable as the stages of the telegraph service in *Ealey* and the phone lines in *Ward*. The Western Union subscriber does not become a subscriber solely to lease a machine, or solely to have the ability to gain access to the local switching point, or solely to have the ability to send and receive intrastate communications. Rather, the customer enjoys access to an interstate, indeed international, telecommunications network by which to transmit and receive messages. This point is no more clearly made than in the parties' Stipulation that Indiana subscribers use that network ninety percent of the time to communicate outside the state's borders. App. 31a. The fact that the charges are unbundled on the subscriber's bill does not change the nature of the business and the interdependence of the services provided in Indiana and in other states. The costs associated with the individual charges for equipment, line use, and access to the switches are necessarily interrelated with and in-

fluenced by the revenue from the entire international Western Union system. It is both simplistic and erroneous to infer from a business' itemized bill that those separate charges reflect separate business functions for tax purposes. It is equally erroneous to assume that those charges reflect activity within Indiana only. Such assumptions fail to take into account the "contributions to income resulting from functional integration, centralization of management and economies of scale." *Mobil*, 445 U.S. at 435. Western Union's income is not derived solely from activity within Indiana, but is attributable to activities in other states as well, and Indiana's taxation of one hundred percent of the income from these various functions does not withstand application of constitutional principles. *See Mobil*, 445 U.S. at 445; *Exxon*, 447 U.S. at 223.

B. *The Tax is Unapportioned*

Because a telegraph transmission crosses state lines and takes place in several states simultaneously, the income or receipts from those transmissions may, under appropriate circumstances, be subject to the tax statutes of various states. The Indiana tax on the gross income of this interstate activity is constitutionally suspect because of the risk of multiple taxation on the same activity. *See Tyler Pipe*, 107 S. Ct. at 2817. The risk of multiple taxation is removed when a tax is properly apportioned because the instrumentality of commerce is then not subjected to more than one tax on its full value. *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 746, n.16 (1978); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447 (1979) ("The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full."). The Court has required that a state impose a tax *only* on that portion of the revenues

fairly attributable to activities within its jurisdiction.[7] In other words, state taxes on interstate commerce must be apportioned.

Recognizing this important constitutional principle, the Indiana Code provides an apportionment formula for the Indiana Adjusted Gross Income Tax. App. 36a. But the Court of Appeals of Indiana did not apply this statutory apportionment formula nor any other. Instead the court deemed apportionment unnecessary because it believed Western Union's activities could be conveniently separated and identified as intrastate and interstate activities. Thus, the court did not even attempt to apportion the tax. The state's neglect of this apportionment formula and its use of the taxpayer's itemized billing statement as a basis for determining what portions of income are from intrastate activity and thus taxable, result in an impermissible, ad hoc and arbitrary determination of taxable income.

The Indiana gross income tax is *not* apportioned. Because the state ignores the purposes to which the equipment, phone lines and access switches are put, the income taxed bears no relation to the actual amounts of income received from intrastate and interstate activity. *See Smith v. Illinois Bell Telephone Company*, 282 U.S. 133, 150 (1930). In *Smith*, the Court considered the manner in which telephone companies' costs of common facilities should be apportioned between interstate and intrastate services for rate-making purposes. The Court determined that attribution of the complete value of the company's exchange station to intrastate services was an inaccurate and inappropriate method of apportioning between the

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[7] *See Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948) (New York tax on gross receipts from transport of goods from one point in New York to another point in New York, but with some transit in Pennsylvania and New Jersey, was properly apportioned according to the mileage travelled in the state.).

intrastate and interstate services that used the facility. *Id.* at 150-51. The Court stated that it is not proper "to ignore altogether the actual uses to which the property is put." *Id.* In the present case it is equally inappropriate for Indiana to tax the entire income Western Union receives from the lease of the equipment or from access to phone lines and switches because these items are used overwhelmingly in interstate commerce. Although the simplicity of allocating to Indiana all income Western Union derives from those charges may be alluring, so arbitrary a division fails to apportion the revenues as required by the standards set forth in *Complete Auto Transit.*

C. *The Unapportioned Tax Results in Multiple Taxation and Discrimination Against Interstate Commerce*

Indiana's failure to apportion this gross income tax presents a very real threat of multiple taxation. While the Court in *Tyler Pipe* held that a demonstration of actual double taxation is not required to invoke constitutional limitations on state taxation of interstate commerce, such actual double taxation does result from Indiana's application of its statute. *See Tyler Pipe* 107 S. Ct. at 2817.

For example, Wisconsin taxes the "toll business gross revenue" of telephone (including telegraph) companies. App. 37a, Wisconsin License Fees Statute, Wis. Stat. § 76.38 (1987). "Toll business gross revenues attributable" to Wisconsin include gross revenue from interstate toll services throughout Western Union's system multiplied by several factors which are applied to apportion Wisconsin's tax. Revenue from system-wide interstate toll services by definition includes revenues generated from Indiana telegraph transmissions. Because Wisconsin taxes the revenue from the entire transmission without

regard to whether it is income generated by the sale of the equipment, the lines, or the switch, the Indiana tax, when laid alongside this Wisconsin tax, results in double taxation of the income Western Union receives from the provision of its telegraph services. The critical difference between the Wisconsin statute and the Indiana statute is that Wisconsin attempts to apportion its tax while Indiana declares simply that there is no need to do so as the "functions" it has tagged as intrastate are taxable in full by Indiana.

Likewise the Illinois tax on telecommunications, Ill. Rev. Stat. ch. 120, para. 2004, currently the subject of appeal to this Court in *Goldberg v. Sweet*, also leads to double taxation of Western Union's Indiana income. This is true because the Illinois tax is imposed at a flat rate of five percent on gross revenues from interstate transmissions originated or received in Illinois and charged to an Illinois service address regardless of where the calls are billed or paid. Because the Illinois tax is imposed on the entire revenue from the interstate communication, and because Indiana refuses to apportion its tax, or even to recognize the interstate nature of the communication, the result is double taxation as to those portions of revenue attributable to those functions that the Indiana court has declared to be intrastate only.

It is precisely the double taxation described above that the Commerce Clause was intended to prevent. State taxes are required to be apportioned "so that no instrumentality of commerce is subjected to more than one tax on its full value". *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. at 447.

Just as lack of apportionment leads to the possibility of double taxation, so does the possibility or actuality of double taxation lead to discrimination against interstate commerce. With double taxation comes a greater tax burden to be borne by interstate telegraph transmissions

as opposed to intrastate telegraph transmissions. Discrimination against interstate commerce has been proscribed by this Court in *Complete Auto Transit. See also Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984).

II. Application of the Indiana Tax Raises Substantial Constitutional Issues of Broad Application

Petitioners in *Goldberg v. Sweet* and *GTE Sprint Communications Corporation v. Sweet* have demonstrated the importance of this Court's plenary review of the application of state taxing statutes to advancing interstate telecommunications technology. The advances in the technology alone, without regard to the hundreds of millions of tax dollars sought by each state's taxing authority, require that this Court revisit the standards announced in *Complete Auto Transit, Inc. v. Brady* as they are applied to telecommunications, including telegraph, systems.

While this Court's consideration of the Illinois statute in *Goldberg* and *GTE Sprint* may respond to the issue of the Commerce Clause's application to state taxation of telecommunications, the Court's decision in those cases may *not* respond to the equally perplexing question raised by application of the Indiana tax. That question deals with the extent to which a state taxing authority, and state court, may adopt so-called functional divisions for an interstate, integrated communications system as a handy method of avoiding application of the Commerce Clause altogether. Absent the Court's consideration of the Indiana tax as applied to Western Union, the Court's decision in *Goldberg* and *GTE Sprint* may be of little value as other states rush to do what Indiana has done—namely, to erect artificial, purportedly geographic divisions in what otherwise is clearly a unitary, integrated, interstate activity. As each state is permitted to join Indiana in declaring parts of interstate income "theirs" for purposes of taxation, the result is double taxation. This the Commerce Clause does not permit.

The Court should note probable jurisdiction in this case to prevent the possibility that the constitutional principles heretofore established in this area, and to be established in *Goldberg* and *GTE Sprint*, are left open to avoidance by the division of interstate communications into arbitrary intrastate segments none of which is subject to the principles announced by this Court because, say the states' taxing authorities, none of them is "interstate".

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE COURT OF APPEALS OF INDIANA
FIRST DISTRICT

No. 73A01-8701-CV-1

INDIANA DEPARTMENT OF REVENUE,
Defendant-Appellant

-v-

THE WESTERN UNION TELEGRAPH COMPANY,
A New York Corporation,
Plaintiff-Appellee

Appeal from the Shelby Circuit Court
The Honorable Charles D. O'Connor, Judge
Cause No. CC-85-138

NEAL, J.

STATEMENT OF THE CASE

Defendant-Appellant, Indiana Department of Revenue (the Department), appeals a judgment rendered by the Shelby Circuit Court in favor of plaintiff-appellee, Western Union Telegraph Company (Western Union). The judgment resulted from Western Union's suit seeking refund of gross income taxes paid for the years 1974 through 1981, and of retail taxes paid for the years 1975 through 1981. This appeal concerns the applicability of the interstate commerce exemption to certain aspects of Western Union's operation.

We reverse and remand in part, and affirm in part.

STATEMENT OF THE FACTS

The facts, as stipulated by the parties, are as follows. Western Union, a New York corporation with its principal office in New Jersey, is a public utility providing telegraph exchange services. Western Union offers two types of teletypewriter service to its subscribers: Telex and TWX. The difference between the two systems is the speed of operation; Telex transmits 70 words per minute and TWX 90 words per minute. Western Union's international network allows a subscriber, through a teletypewriter, to communicate almost instantaneously with another subscriber anywhere in the world. In providing Telex/TWK service Western Union bills its subscribers for four separate monthly charges: equipment, access, usage, and facility.

The equipment charge is paid by the subscriber for the use of the teletypewriter. A subscriber is not required to obtain the equipment from Western Union, and if he buys or rents the equipment from a third party there is no equipment charge.

The access charge entitles a subscriber the use of Western Union's network in order to communicate with other subscribers. This monthly charge, governed exclusively by the Federal Communications Commission, represents the amount paid by Western Union to the telephone company for the lease of circuits to connect a subscriber to the Telex/TWX network.

The usage charge represents the amount billed to a subscriber for his actual use of the network. In the transmission of a message, only the sender is assessed a usage charge, the receiver is not. While the other three charges do not vary from month to month, the usage charge necessarily fluctuates depending on a subscriber's volume of message transmissions.

The facility charge is Western Union's fee for linking a subscriber with the nearest exchange site. Western

Union has twelve exchanges within Indiana, and the charge is on a per-mile basis. If a subscriber is located in the same city as one of the twelve exchanges, it is possible he would not have to pay a facility charge. Of the four charges, all subscribers pay an access charge and a usage charge.

On January 14, 1985, Western Union filed a complaint. Under Count I it sought a refund of corporate gross income taxes paid from 1974 through 1981. Under Count II the utility sought a refund for sales taxes paid from 1975 through 1981. The basis for both counts was Western Union's claim that certain aspects of its operation were exempt from Indiana taxation because those aspects constituted interstate commerce. On March 17, 1986, the parties stipulated as to 34 documents and the above facts. A one-day bench trial was conducted on March 24, 1986. The parties filed a post-trial stipulation on April 21, 1986, agreeing that if Western Union were to receive a judgment in its favor on Count I, the amount would be $214,784.00 plus interest, and that if Western Union were to be successful on Count II, the refund would be $353,767.50 plus interest.

On August 8, 1986, the trial court entered its Findings of Fact and Conclusions of Law. It found that 90% of the Telex and TWX usage by Indiana subscribers involved interstate or intercontinental communications, and that "[e]ach segment or part of the Telex and TWX systems is necessary, integral and essential for the systems to work. . . ." *Record* at 149. Based on these findings the trial court concluded that Western Union's operation constitutes a communication service and not the rental of communication equipment. It also concluded that, given the fact that the vast majority of messages travel without Indiana, linking an Indiana subscriber to an Indiana exchange "is so intrinsically related to and inherently a part of the interstate communication and sale that it constitutes one continuing transaction," ex-

empting the access and facility charges from gross income taxation. *Record* at 150. The trial court also concluded that the access and facility charges were exempt from retail taxation because they involved the provision of tangible personal property and were not regulated by the Public Service Commission, judgment was then entered for Western Union in the stipuated amounts.

ISSUES

The Department presents these issues for our review:

I. Whether the interstate commerce exemption precludes Indiana taxation of Western Union's activities.

II. Whether Western Union's access and facility charges are exempt from Indiana retail tax because those charges are not regulated by the Public Service Commission and they involve the provision of tangible personal property, which is exempted from such tax by statute.

DISCUSSION AND DECISION

ISSUE I: *Gross Income Taxation*

The Department claims it is not precluded from imposing a gross income tax and a sales tax upon those aspects of Western Union's operation that occur entirely within Indiana, even if those aspects are related to interstate commerce.

In *Reynolds Metals Co. v. Indiana Dept. of State Revenue* (1982), Ind. App., 433 N.E.2d 1, this court analyzed the cases which developed the line of demarcation between taxable and non-taxable income where the interstate commerce exemption is claimed. A leading case in this area is *Indiana Dept. of State Revenue v. P.F. Goodrich Corp.* (1973), 260 Ind. 41, 292 N.E.2d 247. In *P.F. Goodrich*, an Indiana corporation owned stock in a Delaware cor-

poration. Upon dissolution of the Delaware corporation, which took place entirely outside of Indiana, Goodrich received income from the liquidation of its stock. The supreme court held that Goodrich's domicile and business activity in Indiana constituted a sufficient basis to justify the imposition of the gross income tax on a portion of the proceeds from the dissolution. *Id.* at 48, 292 N.E.2d at 251. Because the income resulted from a one-instance taxable event incapable of division, the court suggested the three-factor formula of IND. CODE 6-3-2-2(b) as a means to apportion the intrastate and interstate activity. The court conceded that the transaction was interstate commerce, but noted that even interstate commerce must shoulder its just share of the state tax burden for that aspect of the interstate commerce to which the state bears a specific relation, stating: "This is not a tax on interstate commerce but is rather a tax on the privilege of doing business within Indiana measured by the gross income of a domestic corporation which in this case must be apportioned properly because of the interstate aspects of the overall transaction." *Id.* at 48-49 292 N.E.2d at 251.

In *Reynolds Metal, supra,* we held that it is proper to determine taxability on the basis of separate and different transactions or separate and different categories of a taxpayer's transactions, and if a separate or different category of transactions lacks the sufficient connection with the taxing state, then that separate and different transaction or category may not be taxed, even though other transactions or categories of the taxpayer could be taxed. 433 N.E.2d at 11 (*citing Mueller Brass Co. v. Gross Income Tax Division* (1971), 255 Ind. 514, 265 N.E.2d 704; *Gross Income Tax Division v. Owens-Corning Fiberglas Corp.* (1969), 253 Ind. 102, 251 (N.E. 2d 818).

IND. CODE 6-2.1-2-2 contemplates a separation of intrastate income and interstate income, but where the

income cannot be separated, the formula provided by IND. CODE 6-3-2-2(b) is to be applied. A corporation must segregate its accounts and keep sufficient records so that intrastate and interstate activities producing income can be sufficiently identified and interpreted to intelligently assess the interstate commerce exemption. *Reynolds Metals, supra.*

In *Mueller Brass, supra*, the supreme court, despite an interstate commerce exemption claim by the taxpayer, a Michigan corporation, approved the taxation of a portion of the sales income depending upon the manner in which the sales were generated; house accounts and sales made directly by the out-of-state office to Indiana customers were exempt, sales made through the in-state office were not. In *Owens-Corning, supra*, the mere solicitation of in-state orders by an out-of-state company did not form a sufficient basis to impose a tax on the income generated by the solicitation. Payment on a contract for a construction project, bid by an out-of-state business and to be performed intrastate by a subcontractor, has been held to be taxable income as against an interstate commerce exemption argument. *Gross Income Tax Division v. Fort Pitt Bridge Works* (1949), 227 Ind. 538, 86 N.E.2d 685; *Reynolds Metals, supra.* Sales of an Indiana citizen's farm products by an out-of-state commission agent are exempt. *Gross Income Tax Division v. Strauss* (1948), 226 Ind. 329, 79 N.E.2d 103; *Gross Income Tax Division v. Quick* (1948), 226 Ind. 338, 78 N.E.2d 871. However, income tax may be assessed to an in-state consignment agent on his commissions, but not the sale price of the goods, for the sale of consigned goods which remain in the name of the out-of-state consignor until sold. *Dept. of Treasury v. Spindler Co.* (1943), 222 Ind. 53, 51 N.E.2d 363.

Western Union argues that the entire telecommunication network is offered as a whole to its customers for the purpose of sending and receiving teletypewritten

messages. Each part of the system is necessary, essential, and integral to the operation of the network. In sum, Western Union contends that because the transmission of a message constitutes one continuing interstate transaction, each part of the system is non-separable and non-taxable. Western Union cites the following cases as support for its position.

In *Gross Income Tax Division v. Chicago District Electric Generating Corp.* (1956), 236 Ind. 117, 139 N.E. 2d 161, the taxpayer was a corporation engaged in the production, transmission, and sale of electrical energy. Its only plant was located in Indiana, and it sold electricity to only two customers, a public utility in Indiana and one in Illinois. The taxpayer claimed an interstate commerce exemption for the sale of electricity to its Illinois customer. Dividing 3-2, the supreme court held that the generation and transmission of electricity is a continuous and simultaneous operation, and, where it is sold across state lines, such is an exempted transaction in interstate commerce. *Id.* at 122, 139 N.E.2d at 164. In separate dissents Chief Justice Achor and Justice Arterburn contended that the taxpayer's income resulted from the generation and production of electricity, a process occurring entirely within Indiana. Justice Arterburn maintained that the fact that the electricity was transmitted a few feet into Illinois was not a sufficient reason to confer an exemption; in fact, by doing so the majority gave the Illinois customer an unfair advantage over its Indiana counterpart.

Also cited is *Michigan-Wisconsin Pipe Line Co. v. Calvert* (1954), 347 U.S. 157, where a state sought to impose a tax on the loading of gas into an interstate pipeline network. In striking down the tax the U.S. Supreme Court looked to the practical effect of loading the gas into an interstate network and determined that this activity could not be separated from the interstate commerce.

An important distinction exists between the two preceding cases and Western Union's operation. In those cases the customer is located in another state; here, the customers and the facilities are in Indiana. Thus, there is no possibility of discrimination against interstate commerce either by providing a direct commercial advantage to intrastate businesses or by creating the possibility of multiple taxation. *See Indiana Dept. of State Revenue v. Frank Purcell Walnut Lumber Co.* (1972), 152 Ind. App. 122, 282 N.E.2d 336, *trans. denied.*

Western Union also argues that *Gross Income Tax Division v. Surface Combustion Corp.* (1953), 232 Ind. 100, 111 N.E.2d 50, *cert. denied*, 346 U.S. 829, and *Indiana Dept. of State Revenue v. Brown Boveri Corp.* (1982), Ind. App. 429 N.E.2d 285 are controlling authority. In both cases the gross income tax was applied to transactions involving the installation of furnace systems in Indiana businesses by out-of-state corporations. In granting interstate commerce exemptions the courts stated that the determining factor is whether the activities in Indiana are so intrinsically related to and inherently a part of the interstate sale that it is seen as one continuing transaction. Because the transactions were viewed as sales of functioning systems for lump sum prices, and not sales of individual component parts, the courts held they were exempt as interstate commerce. 232 Ind. at 129, 111 N.E.2d at 62; 429 N.E.2d at 288.

A distinction exists between these two cases and *Fort Pitt Bridge Works, supra*, a distinction recognized by the *Surface Combustion* court. *Fort Pitt Bridge Works* involved a contract to furnish material and erect buildings in Indiana, clearly a transaction for the performance of a local activity within this state.

Western Union's arguments do not overcome the holding of *P.F. Goodrich, supra*, which permitted a partial taxation of a purely interstate transaction. Even if we

adopt Western Union's position as to the single, integrated system operating in interstate commerce, under *P.F. Goodrich*, *supra*, Western Union still must bear its share of the state tax burden because its facilities, equipment, and servicing are located here, and Indiana has a relation to those things. If the income generated by the local activities cannot be separated and identified, the formula provided by IND. CODE 6-3-2-2(b) is to be applied. However, here the local activities have been conveniently separated and identified, so it is not necessary to resort of [sic] the formula. *See Reynold Metals*, *supra*.

The argument that transmitting a message is one continuous transaction in interstate commerce, and therefore totally exempt from taxation, is invalid. Even if it is entirely an interstate transaction, it must bear a share of the state tax burden for those aspects of the commerce to which Indiana bears a special relation. *General Motors Corp. v. Washington* (1964), 377 U.S. 436; *P.F. Goodrich*, *supra*. The equipment, access, and facility charges are clearly identified and separately billed. These charges bear a special relation to this state and will not be subjected to multistate taxation. Therefore, imposition of the gross income tax relative to these charges was not an undue burden on interstate commerce. Accordingly, we reverse the trial court's judgment as to Count I.

ISSUE II: *Gross Retail Taxation*

The trial court ruled that Western Union's access and facility charges were not subject to Indiana gross retail taxation because these charges were not regulated by the Public Service Commission and they involve the provision of tangible personal property, which is exempted by statute from such tax.

The Department argues that the applicable statute does not require that the Public Service Commission establish rates for these charges as a condition to the imposition of the tax, and the evidence was insufficient

that the access and facility charges constituted the provision of tangible personal property.

Pursuant to IND. CODE 6-2.5-4-7(a),[1] "A person engaged as a public utility is a retail merchant making a retail transaction when the person furnishes intrastate telegraph service," and, under 45 IAC 2.2-4-17(b), "the gross income received therefrom shall constitute gross retail income from a retail transaction."

In concluding that the access and facility charges were exempt from the gross retail tax because they were not regulated by the Public Service Commission the trial court relied upon Instruction 2(d) of the Department's Revenue Circular ST-23, and subsection III of Sales Tax Regulation 37-400, which is codified at 45 IAC 2.2-4-17(c).

Instruction 2(d) of Revenue Circular ST-23 provides:

> With respect to the furnishing of *intrastate telegraph service* by public utilities, the gross retail tax shall apply to charges imposed on a customer or consumer of such public utility for the transmission and delivery of an *intrastate* telegraph whether paid in cash or billed as well as for the right to transmit specific written messages or intelligence through the use of equipment provided by such public utility *where the charges for the transmission of such messages or intelligence are based upon a schedule of rates filed with and approved by the Public Service Commission of Indiana and excluding charges imposed for the furnishing of equipment and facilities used in connection therewith.* (Emphasis supplied)

Subsection III of Sales Tax Regulation 37-400 states:

> Intrastate telegraph service: The tax is imposed on a consumer for the privilege of transmitting tele-

[1] Formerly codified at IND. CODE 6-2-1-38(e).

> grams, specific written messages, or intelligence through the use of equipment provided by public utilities *where the amount of the charge for such messages or intelligence is regulated by the Public Service Commission of Indiana.* The tax applies to the total receipts of such public utilities for transmission of such messages or intelligence. (Emphasis supplied)

The trial court found that the equipment, access, and facility charges are exclusively regulated by the Federal Communications Commission, and that Western Union's PSC tariff for the tax periods involved had no rates for the access and facility charges. In claiming that the trial court erred in this determination the Department places itself in the unenviable position of arguing that its own regulation is invalid.

We believe the regulations are clear that, in the absence of regulation by the Public Service Commission, the access and facility charges are exempt from the gross retail tax. We do note that, absent a regulation or statute, the fact that a utility is regulated by a federal agency to the exclusion of a state agency does not deprive Indiana of the ability to tax. *See Chicago District Electric Generating Corp., supra.*

The trial court also concluded that the access and facility charges were exempt from the gross retail tax because of IND. CODE 6-2.5-4-7(b)(1), which states that "a person engaged as a public utility is not a retail merchant making a retail transaction when the person provides, installs, constructs, services, or removes tangible personal property which is used in connection with the furnishing of intrastate telegraph service." The Department argues that the evidence was insufficient to show that tangible personal property is involved in the access and facility charges.

We disagree. Given the nature of the access and facility charges, the broad language of IND. CODE 6-2.5-

4-7(b)(1), and the definition of "provide," as found in the *American Heritage Dictionary* (1978), as "to furnish, supply, or make available," the trial court's conclusion was correct, and its judgment as to Count II is affirmed.

For the above reasons, the cause is remanded and the trial court is instructed to enter a judgment for the Department on Count I. The judgment on Count II is affirmed.

Judgment reversed in part and affirmed in part.

RATLIFF, C. J. and
MILLER, P.J. CONCUR.

APPENDIX B

STATE OF INDIANA)
) SS:
COUNTY OF SHELBY)

IN THE SHELBY CIRCUIT COURT

Cause No. CC-85-138

THE WESTERN UNION TELEGRAPH COMPANY, a New York Corporation,
Plaintiff,

vs.

INDIANA DEPARTMENT OF REVENUE,
Defendant.

[Filed Aug. 8, 1986]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

On March 24, 1986, Plaintiff, The Western Union Telegraph Company, appeared in open Court by Chester W. Parowski and by counsel, Richard L. Gilliom, H. William Irwin and J. Bradley Schooley. Defendant, Indiana Department of Revenue, appeared in open Court by James Turner and by Deputy Attorney General, Ted J. Holaday. Trial of this cause was held upon Plaintiff's Complaint.

The Court, having heard all of the evidence in this cause, having heard the witness testify, having observed the manner in which he testified, and having determined

his credibility, having weighed the evidence and having taken this matter under advisement, now enters its FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT as follows:

FINDINGS OF FACT

1. Plaintiff, The Western Union Telegraph Company, (hereinafter referred to as "Western Union") is a corporation incorporated under the laws of the State of New York.

2. Plaintiff, Western Union, is a duly organized and existing public utility conducting interstate and intrastate operations with its principal offices at 1 Lake Street, Upper Saddle River, New Jersey 07458.

3. Western Union, from 1974 through 1981 and to date, among its other businesses, furnishes Telex and TWX teletypewriter exchange service to customers including, as a necessary part thereof the access from a teletypewriter or other data station to the teletypewriter exchange system.

4. A Telex or TWX customer has the privilege of intercommunication by means of the station on his premises with substantially all persons having teletypewriters or other data stations constituting a part of the nationwide or international teletypewriter exchange system. Telex and TWX services are a form of telegraph service. A TWX customer in Indiana can send TWX-messages to all TWX stations located in the United States or Canada. A Telex customer in Indiana can send Telex messages to all Telex stations located throughout the world.

5. Four basic recurring separate monthly charges are payable by subscribers to Western Union's Telex and TWX service:

(a) A monthly basic station equipment charge for the teleprinter.

(b) A monthly network access charge for access to the entire network through one of the Indiana exchanges.

(c) A monthly variable usage charge based upon a certain dollar figure per pulse.

(d) A monthly per mile facility charge from the customer's location to the city limits of the Indiana city in which the Telex or TWX exchange is located, if the customer is outside the city limits.

6. From 1974 to date plaintiff, Western Union, among its other business and services, furnishes Telex and TWX teletypewriter exchange services to customers for intrastate and interstate communication. Western Union is the sole operating domestic telegraph company in the United States and has formed a national telegraph network over which Telex and TWX communications are sent. Additionally, the Telex and TWX service embraces any subscriber to that service in Alaska, Canada or Mexico and in other foreign countries.

7. Internal Revenue Code Section 4252(c) defines teletypewriter exchange service as follows:

> The access from a teletypewriter or other data station to the teletypewriter exchange system of which such station is a part, and the privilege of intercommunication by such station with substantially all persons having teletypewriter or other data stations constituting a part of the same teletypewriter exchange system, to which the subscriber is entitled upon payment of a charge or charges (whether such charge or charges are determined on a flat periodic amount, on the basis of distance and elapsed transmission time, or in some other manner).

8. Teletypewriter exchange service provides for the transmission of record communications between any two

subscriber stations. The calling subscriber may establish a connection to only one station at a time. The term "station" as used in connection with such service denotes each set of transmitting and receiving equipment, or receiving-only equipment, on the premises of the subscriber and connected to the services.

9. A subscriber to Telex or TWX has on its premises teletypewriter sending or receiving equipment, or both, which are connected by telephone lines to Telex or TWX exchange located in one of several Indiana cities. A communication sent from a subscriber's premises, goes through the exchange, and in the vast majority of cases is sent on to another subscriber's premises in another state of the United States. Conversely a subscriber in a state other than Indiana may send a communication through an exchange that is received by the Indiana subscriber at his premises.

10. A person cannot send or receive communications without the teletypewriter equipment; likewise if the teletypewriter equipment was not connected with the telephone wire to the exchange point, a communication could neither be sent nor received. If there is no exchange point, a communication cannot be received from other subscriber stations or sent to other subscriber stations, and if there is not access to a receiving station, the communication cannot be accomplished. The sending and/or receiving equipment at one end for which there is an equipment charge, is useless by itself; its connection through modems (access and facility) to an original exchange for which there is a charge, is essential to the complete system and without which the equipment would be useless. Without a connection to an original exchange, the system is useless; the same is true as the communication passes through modems to the terminal subscriber with whom communication is made. Without any of the latter elements, the communication circuit cannot be completed.

11. During the years in question in this litigation, ninety percent (90%) of Telex and TWX usage was for communications to a state or country outside the State of Indiana.

12. The equipment charges, access charges and facility charges are regulated by the Federal Communications Commission, exclusive of state regulatory bodies.

13. Western Union Tariff PSCI No. T-1 in effect from 1974 through 1981 had no rate or charge for equipment, access or facility charges; the only rate in said Indiana Tariff was for usage charges to Telex and TWX subscribers.

14. Included in the access charge and the facility charge are charges that Western Union pays the local telephone company for circuits which Western Union leases for access between the customer's location and the Western Union Telex network; these leases are based upon charges in tariffs filed with the Federal Communications Commission by the local telephone companies.

15. In describing the Telex service in the Indiana Tariff PSCI No. T-1, it is stated that "The telegraph company furnishes Telex service subscribers with channel facilities and the necessary connecting equipment at the subscriber's premises. When requested by the Customer, station equipment is also provided. See Tariff FCC No. 240." In the description of Telex service in the Indiana Tariff PSCI No. T-1 at page 62 it is described as follows:

> "Telex service provides for the transmission of record communications directly between any two Telex subscriber stations. The calling subscriber may astablish a connection to only one other station at a time. The term "station" as used in connection with Telex Service denotes each set of transmitting and receiving equipment, or receiving-only equipment, on the premises of the subscriber and connected for Telex Service.

"The facilities furnished permit the transmission of communications in each direction alternately, but not simultaneously, at a maximum speed of approximately 400 operations (key or bar depressions) per minute.

"The telegraph company for and in connection with Telex Service does not undertake to perform any transmission functions but merely furnishes its facilities to Telex subscribers for their use.

"Telex Service is offered only on a prepaid basis and is available 24 hours per day, 7 days per week."

16. Indiana Tariff PSCI No. T-1 at page 139 describes teletypewriter exchange service (TWX) as follows:

"This section of the tariff applies to teletypewriter exchange service furnished by The Western Union Telegraph Company between points within this state.

"Intrastate service is furnished in conjunction with interstate service, regulations and charges for which are published in Tariff FCC No. 258.

"Teletypewriter exchange service is the furnishing of facilities for typewritten and data communication between teletypewriter exchange service stations.

"The telegraph company furnishes a line from its office to the customer's premises together with connecting and station equipment as provided in Tariff FCC No. 258. A listing of the name of the customer, firm or corporation or a name under which business is conducted, is provided in the teletypewriter exchange service directories, except as otherwise provided in Tariff FCC No. 258.

"TWX is provided to operate at speeds of up to 100 words per minute. TWX also may be used for transmission of data at speeds of up to 150 bits per second in sequence."

17. On September 7, 1982, after the years of 1974 through 1981 in question, the Public Service Commission of Indiana approved the cancellation of The Western Union Telegraph Company Tariff PSCI No. T-1.

18. Prior to mid-1973, the Telex and TWX tariffs did not specifically include a charge designated as access. At that time the telegraph company furnished equipment to its subscribers, and included in the charge for equipment were those costs associated with access. During 1973, as a result of Western Union's acquisition of the TWX service from the Bell System, the telegraph company began to permit the connection of customer-owned and provided equipment to the Telex/TWX networks. At that time a separate charge for access to the network was established. A customer who obtains his equipment from Western Union for Telex or TWX service pays an access charge and separately an equipment charge. A customer who obtains his equipment elsewhere for Telex or TWX service pays only an access charge.

19. Western Union provides Telex and TWX service to a number of cities within the State of Indiana based upon the cost effectiveness of placing the equipment and providing service.

20. The usage charge is a charge made against only the sender of a message and not the receiver of a message.

21. An interstate message will travel from the subscriber's premises to an Indiana exchange switch or switches and then on to an exchange switch or switches in another state for delivery to its destination in a state other than Indiana. An intrastate message travels from the subscriber's premises to an Indiana exchange switch or switches and then to the Indiana destination subscriber.

22. The access charge entitles a subscriber to send messages within the State of Indiana and outside of the

State of Indiana through the network nationwide and in some cases foreign countries.

23. The equipment looks similar to a large typewriter with a dial in both the Telex and TWX systems. The sender of the message selects the subscriber to whom he wants to communicate and dials that number and the Telex or TWX network accepts that number and switches it through the network and connects those two terminals.

24. The Western Union Telegraph Company Tariff PSCI No. T-1 describes Telex as a service and TWX as a service. The Western Union Telegraph Company Tariff FCC No. 240 describes Telex as a service and The Western Union Telegraph Company Tariff FCC No. 258 describes TWX as a service.

25. A Telex or TWX exchange is electromechanically operated; a Telex subscriber can communicate over the Telex and TWX systems with a TWX subscriber and vice versa. The difference between Telex and TWX is the speed of the transmission. All Telex and TWX subscribers have an access and a useage charge.

26. Telex and TWX subscribers who use Western Union teletypewriter equipment and pay an equipment charge do not acquire any ownership in that equipment; Western Union owns such equipment and removes it and places it in stock when the subscriber terminates. A terminating subscriber receives nothing for the equipment.

27. Telex and TWX teletypewriter send/receiving equipment and exchange switches are provided, installed and serviced by Western Union.

28. Each segment or part of the Telex and TWX systems is necessary, integral and essential for the systems to work including Facility, Equipment, Access, Switch Exchanges and the lines or means used to transmit the communications.

29. When the sending and receiving stations are connected on the Telex or TWX systems and a sender begins to typewrite his communication, it is printed out on the receiving equipment almost instantaneously.

30. Plaintiff paid $39,529.78 as Gross Income Tax and Interest to Defendant on May 23, 1984.

31. Plaintiff paid Defendant $208,455.25 as Gross Income Tax and Interest on December 7, 1984.

32. Plaintiff paid Defendant $349,425.64 as Sales Tax and Interest on December 7, 1984.

CONCLUSIONS OF LAW

1. Interstate communications sent by way of The Western Union Telegraph Company Telex Service and teletypewriter exchange service (TWX) constitute interstate communication sales.

2. The sending of a Telex or TWX message from a subscriber located in Indiana and received by a subscriber in a state other than Indiana is one continuing communication or transaction in interstate commerce.

3. The supply or furnishing of Telex or TWX communication faacilities by The Western Union Telegraph Company constitutes the rendition of a communication service and not, as a part thereof, a rental of communication equipment. In the case of an interstate communication by Telex or TWX the linking of an Indiana subscriber's terminal to an Indiana switching center for which there could be both an access and facility charge is so intrinsically related to and inherently a part of the interstate communication and sale that it constitutes one continuing transaction that is exempt from Indiana gross income tax pursuant to Indiana Code 6-2-1-7(a) and Indiana Code 6-2.1-3-3.

4. Ninety percent (90%) of the Indiana gross income corporation taxes and penalties based upon gross income

for the equipment, access and facility charges received by The Western Union Telegraph Company for Telex and TWX service for the years 1974 through 1980 were unlawfully billed and collected from The Western Union Telegraph Company by the Indiana Department of Revenue in violation of I.C. 6-2-1-7(a) and I.C. 6-2.1-3-3.

5. Plaintiff, The Western Union Telegraph Company, is entitled to recover from Defendant, Indiana Department of Revenue, the sum of Two Hundred Fourteen Thousand Seven Hundred Eighty-Four Dollars ($214,-784.00) plus interest.

6. The Western Union Telegraph Company Telex and teletypewriter exchange service (TWX) access and facility charges made for the years 1975 through 1981 are not subject to Indiana sales tax since said charges during said period were not regulated by the Public Service Commission of Indiana in light of Indiana Department of Revenue Circular ST-23, Instruction 2(d) and Sales Tax Regulation 37-400, subsection III, and Sales Tax Rule 45 IAC 2.2-4-17 (Rag. 6-2.5-4-7(a)(010) Section 17(c).

7. The Western Union Telegraph Company Telex and teletypewriter exchange service (TWX) access and facility charges made for the years from 1975 through 1981 are not subject to Indiana sales tax since said charges were charges for providing tangible personal property used in connection with the furnishing or telegraph service in light of I.C. 6-2.5-4-7; Indiana Sales Tax Regulation 37-420, subsection II; Indiana Sales Tax Rule 45 IAC 2.2-4-18 (Rag. 6-2.5-4-7(b)(010) section 18(b).

8. The Indiana sales tax based upon access and facility charges received by The Western Union Telegraph Company for Telex and teletypewriter exchange service (TWX) from 1975 through 1981 was unlawfully billed and collected by the defendant in violation of Indiana

Code 6-2.5-4-7 and the Indiana Department of Revenue Regulations and Rules thereunder.

9. Plaintiff, The Western Union Telegraph Company is entitled to recover from Defendant, Indiana Department of Revenue, Three Hundred Fifty-Three Thousand Seven Hundred Sixty-Seven Dollars and Fifty Cents ($353,767.50) plus interest.

JUDGMENT

Court now enters Judgment for Plaintiff, The Western Union Telegraph Company, and against Defendant, Indiana Department of Revenue, in the sum og $214,784.00 on Count I of Plaintiff's Complaint.

The Court further enters Judgment for Plaintiff, The Western Union Telegraph Company, and against the Defendant, Indiana Department of Revenue, in the sum of $353,767.50 on Count II of Plaintiff's Complaint.

Said Judgments shall bear interest as prescribed by law.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED this 8th day of August, 1986.

/s/ Charles D. O'Connor
CHARLES D. O'CONNOR, Judge
Shelby Circuit Court

APPENDIX C

STATE OF INDIANA

[SEAL]

Indianapolis, 46204

CLERK 0F THE SUPREME COURT
COURT OF APPEALS AND TAX COURT

Daniel Rock Heiser, Clerk
217 State House

Telephone 317-232-1930

Richard L. Gilliom
Two Market Square Center
251 E. Ohio St., Ste. 1100
Indianapolis, IN 46204-0000

Cause Number 73A01-8701-CV-00001

Lower Cause CC85-138, CIR.

INDIANA DEPT. OF REVENUE

v.

WESTERN UNION TELEGRAPH CO.

You are hereby notified that the COURT OF APPEALS has on this day 9/29/87 APPELLEE'S PETITION FOR REHEARING DENIED. WESLEY W. RATLIFF, JR., CHIEF JUDGE.

WITNESS my name and the seal of said Court, this 29th day of September, 1987.

/s/ Daniel Heiser
DANIEL HEISER
Clerk Supreme Court,
Court of Appeals and Tax Court

APPENDIX D

STATE OF INDIANA

[SEAL]

Indianapolis, 46204

CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

Daniel Rock Heiser, Clerk
217 State House

Telephone 317-232-1930

Richard L. Gilliom
Two Market Square Center
251 E. Ohio St., Ste. 1100
Indianapolis, IN 46204-0000

Cause Number 73A01-8701-CV-00001

Lower Cause CC85-138, CIR.

INDIANA DEPT. OF REVENUE

v.

WESTERN UNION TELEGRAPH CO.

You are hereby notified that the SUPREME COURT has on this day 4/22/88 APPELLEE'S PETITION FOR TRANSFER AND REQUEST FOR ORAL ARGUMENT IS HEREBY DENIED. SHEPARD, C.J. ALL JUSTICES CONCUR.

WITNESS my name and the seal of said Court, this 22nd day of April, 1988.

/s/ Daniel Heiser
DANIEL HEISER
Clerk Supreme Court,
Court of Appeals and Tax Court

APPENDIX E

IN THE COURT OF APPEALS OF INDIANA
FIRST DISTRICT

No. 73A01-8701-CV-00001

THE WESTERN UNION TELEGRAPH COMPANY,
A NEW YORK CORPORATION

v.

INDIANA DEPARTMENT OF REVENUE

[Filed July 11, 1988]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Western Union Telegraph Company hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of Indiana, reversing Count I of the trial court's judgment, entered in this action on August 11, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ Richard L. Gilliom
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Attorneys for The Western Union
Telegraph Company

PROOF OF SERVICE

I, Richard L. Gilliom, certify that on July 11th, 1988, I caused the Notice of Appeal to the Supreme Court of the United States to be served upon Linley E. Pearson and Ted. J. Holaday, attorneys for Appellee at the Office of the Attorney General of Indiana, 219 State House, Indianapolis, Indiana 46204, by causing one true and correct copy to be placed, first class postage prepaid, in envelopes, correctly addressed, and sent by United States Mail.

/s/ Richard L. Gilliom
RICHARD L. GILLIOM

APPENDIX F

STATE OF INDIANA)
) ss:
COUNTY OF SHELBY)

IN THE SHELBY CIRCUIT COURT

Cause No. CC-85-138

THE WESTERN UNION TELEGRAPH COMPANY, a New York Corporation,
Plaintiff,

v.

INDIANA DEPARTMENT OF REVENUE,
Defendant.

[Filed Mar. 17, 1986]

STIPULATION OF FACTS

Come now the parties to the above-captioned action and by counsel stipulate, for the purposes of this action, that the following facts are true.

1. The Western Union Telegraph Company is a corporation incorporated under the laws of the State of New York.

2. The Western Union Telegraph Company is a duly organized and existing public utility conducting interstate and intrastate operations with its principal offices at 1 Lake Street, Upper Saddle River, New Jersey 07458.

3. From 1974 through 1981 and to date The Western Union Telegraph Company, among its other business, furnishes Telex and TWX teletypewriter exchange service to customers including as a necessary part thereof the access from a teletypewriter or other data station to the teletypewriter exchange system.

4. A Telex or TWX customer has the privilege of intercommunication by means of the station on his premises with substantially all persons having teletypewriters or other data stations constituting a part of the nationwide or international teletypewriter exchange system. Telex and TWX services are a form of telegraph service. A TWX customer in Indiana can send TWX messages to all TWX stations located in the United States or Canada. A telex customer in Indiana can send Telex messages to all Telex stations located throughout the world.

5. There are four basic recurring separate monthly charges payable by a subscriber to said service:

(a) A monthly basic station equipment charge for the teleprinter.

(b) A monthly network access charge for access to the entire network through one of the Indiana exchanges.

(c) A monthly variable usage charge based upon a certain dollar figure per pulse.

(d) A monthly per mile facility charge from the customer's location to the city limits of the Indiana city in which the Telex or TWX exchange is located, if the customer is outside the city limits.

6. From 1974 to date Plaintiff, Western Union, among its other business and services, furnishes Telex and TWX teletypewriter exchange services to customers for intrastate and interstate communication. Western Union is

the sole operating domestic telegraph company in the United States and has formed a national telegraph network over which Telex and TWX communications are sent. Additionally, the Telex and TWX service embraces any subscriber to that service in Alaska, Canada or Mexico and in other foreign countries.

7. Internal Revenue Code Section 4252(c) defines teletypewriter exchange service as follows:

> The access from a teletypewriter or other data station to the teletypewriter exchange system of which such station is a part, and the privilege of intercommunication by such station with substantially all persons having teletypewriter or other data stations constituting a part of the same teletypewriter exchange system, to which the subscriber is entitled upon payment of a charge or charges (whether such charge or charges are determined on a flat periodic amount, on the basis of distance and elapsed transmission time, or in some other manner).

8. Teletypewriter exchange service provides for the transmission of record communications between any two subscriber stations. The calling subscriber may establish a connection to only one other station at a time. The term "station" as used in connection with such service denotes each set of transmitting and receiving equipment, or receiving-only equipment, on the premises of the subscriber and connected to the services.

9. A subscriber to Telex or TWX has on its premises teletypewriter sending or receiving equipment, or both, which are connected by telephone line to a Telex or TWX exchange located in one of several Indiana cities. A communication sent from a subscriber's premises, goes through the exchange, and in the vast majority of cases is sent on to another subscriber's premises in another state of the United States. Conversely a subscriber in a state other than Indiana may send a communication

through an exchange that is received by the Indiana subscriber at his premises.

10. If a person did not have the teletypewriter equipment, he could neither send nor receive communications; likewise if the teletypewriter equipment were not hooked up with the telephone wire to the exchange point, a communication could not be sent or received; and if there were not an exchange point, a communication could not be received from other subscriber stations or sent to other subscriber stations and if there was not access to a receiving station, the communication could not be accomplished. The sending and/or receiving equipment at one end for which there is an equipment charge, would be useless by itself; its connection through modems (access and facility) to an original exchange for which there is a charge, is essential to the complete system and without which the equipment would be useless; without a connection to an original exchange, the system would be useless; and the same is true as the communication passes through modems to the terminal subscriber with whom communication is made. Without any of the latter elements, the communication circuit could not be completed.

11. For the purposes of this litigation the parties agree and stipulate that during the years in question ninety percent (90%) of Telex and TWX useage was for communications to a state or country outside the State of Indiana.

Respectfully submitted,

INDIANA DEPARTMENT OF STATE
REVENUE

By: /s/ Glenna G. Dudley
Deputy Commissioner

LINLEY E. PEARSON
Attorney General of Indiana

By: /s/ Ted J. Holaday
TED J. HOLADAY
Deputy Attorney General

THE WESTERN UNION
TELEGRAPH COMPANY

By Its Attorneys:

STEWART IRWIN GILLIOM
FULLER & MEYER

By: /s/ Richard L. Gilliom
RICHARD L. GILLIOM

By: /s/ H. William Irwin
H. WILLIAM IRWIN

APPENDIX G

6-2.1-2.2. Imposition of gross income tax—(a) An income tax, known as the gross income tax, is imposed upon the receipt of:

(1) The entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana; and

(2) The taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana.

(b) The receipt of taxable gross income is subject to the applicable rate of tax fixed under section 3 [6-2.1-2-3] of this chapter. The rate of tax is determined by the type of transaction from which the taxable gross income is received. [IC 6-2.1-2-2, as added by Acts 1981, P.L. 77, § 1.]

APPENDIX H

6-2.1-3-3. Income derived from interstate commerce.—Gross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution. [IC 6-2.1-3-3, as added by Acts 1981, P.L. 77, § 1.]

APPENDIX I

6-2-1-7 [64-2606]. Exemptions.—There shall be excepted from the gross income taxable under this chapter:

(a) [Income derived from interstate commerce—salaries, pensions and interest paid by United States] So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the state of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America. There shall also be excepted from such gross income, salaries, pensions, and other emoluments paid by the United States of America, and interest or other earnings paid upon bonds or other securities issued by the United States of America, but only to the extent that the state of Indiana is prohibited from imposing a tax upon such salaries, pensions, emoluments, interest and/or earnings, by the Constitution of the United States of America.

* * * *

APPENDIX J

6-3-2-2 [64-3219]. Adjusted gross income as applied to corporations and nonresidents.— * * *

* * * *

(b) If the business income derived from sources within the state of Indiana of a corporation or nonresident person cannot be separated from the business income of such person or corporation derived from sources without the state of Indiana, then the business income derived from sources within this state shall be determined by multiplying the business income derived from sources both within and without the state of Indiana by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three [3].

* * * *

APPENDIX K

SUBCHAPTER II

TELEPHONE COMPANIES; CAR LINE COMPANIES; ELECTRIC COOPERATIVE ASSOCIATIONS

[¶ 92-692]

Sec. 76-38. Telephone license fees.—(1) For the purposes of this section the following definitions and provisions shall apply:

In this section: (*As amended by Act 29, Laws* 1985, *effective January* 1, 1986.)

[¶ 92-694]

(b) "Gross revenues" includes all revenue derived from local and rural exchange service, all toll business gross revenue, and all other operating revenues from telecommunications business. It does not include excise taxes on telephone services or facilities nor uncollectible telecommunications revenue actually written off during the year. "Gross revenues" include recoveries within the year of all telecommunications revenues written off in prior years as uncollectible. For a telephone company operating on any form of mutual basis, "gross revenues" includes all amounts assessed against the members for the operation and maintenance of the business. "Gross revenues" also include access revenues and revenues from directory advertising. For qualifying telecommunications resellers, "gross revenues" does not include the allocable share of approved reselling services sold to the public. "Gross revenues" does not include any revenues collected from service users under s. 146.70(3). For fees assessed on May 1, 1989, and thereafter, telecommunications companies may deduct 14.5% of the access expenses incurred during the previous year. (*As amended by Acts 29 and*

297, Laws 1983; *Act 27, Laws* 1987, *effective January* 1, 1988, *first applicable to fees assessed on May* 1, 1989.) [Comp. ¶ 80-302A.]

[¶ 92-694a]

(bf) "Originating revenues factor" means a fraction the numerator of which is the revenues of the telephone company from toll business originated from customer premises equipment in this state, regardless of the location to which the billing notice is sent, and the denominator of which is the total revenues of the telephone company from toll business everywhere. (*As added by Act 29, Laws* 1985, *effective January* 1, 1986.) [Comp. ¶ 80-302A.]

[¶ 92-694c]

(bL) "Property factor" means a fraction the numerator of which is the average value of the property owned or rented by the telephone company and used in operating its telecommunications business in this state and the denominator of which is the average value of the property owned or rented by the telephone company and used in operating its telecommunications business everywhere. (*As added by Act 29, Laws* 1985, *effective January* 1, 1986.) [Comp. ¶ 80-302A.]

[¶ 92-694f]

(bm) "Telecommunications facility" means telephone line, telegraph line, microwave, satellite, cellular radio, fiber optics, coaxial cable or any other transmission facility or any switching device used in the provision of telecommunications services. (*As added by Act 29, Laws* 1985, *effective January* 1, 1986.)

[¶ 92-694g]

(br) "Telecommunications services" means the transmissions of voice, video, facsimile or data messages, including telegraph messages. "Telecommunications serv-

ices" does not include cable television, broadcast television, radio, one-way radio paging and the transmission of messages incidental to transient occupany in hotels, as defined in s. 50.50(3). (*As added by Act 29, Laws* 1985, *effective January* 1, 1986.)

[¶ 92-695]

(c) "Telephone company" means any person operating a telecommunications facility or providing telecommunications services to another person, including the resale of those services provided by another telephone company "Telephone company" does not include any person who operates a private shared telecommunications system as defined in s. 196.201(1) and who is not otherwise a telephone company. (*As amended by Ch. 20, Laws* 1981; *Act* 189, *Laws* 1983; *Act 29, Laws* 1985; *Act 27, Laws* 1987, *effective August* 1, 1987.) (Comp. ¶ 80-051a.]

[¶ 92-696a]

(e) "Toll business gross revenues" means gross revenues from toll business originating and terminating in this state and toll business gross revenues attributable to this state. (*As added by Act 29, Laws* 1985, *effective January* 1, 1986.)

[¶ 92-696b]

(f) "Toll business gross revenues attributable to this state" means the telephone company's total gross revenues from interstate toll services everywhere multiplied by the amount obtained by dividing the sum of the property factor and the originating revenues factor by 2, except that the department may determine toll business gross revenues, attributable to this state based on other facts and circumstances if, in the department's judgment, the formula under this paragraph does not produce a substantially just and correct determination. (*As added by Act 29, Laws* 1985, *effective January* 1, 1986.) [Comp. ¶ 80-302A.]

[¶ 92-700]

(5) (intro.) Every telephone company operating a toll line or toll lines or furnishing toll service shall pay an annual license fee to be computed upon toll business gross revenues as follows: (*As amended by Act 29, Laws* 1985, *effective January* 1, 1986.)

[¶ 92-700a]

(a) On the total gross revenues from toll business, if such gross revenues are less than $25,000, 2.813%. (*As repealed and reenacted by Ch.* 39, *Laws* 1975, *effective for payments due on May* 15, 1976, *and thereafter.*) [Comp. ¶ 80-402.]

[¶ 92-700b]

(b) On the total gross revenues from toll business, if such gross revenues equal or exceed $25,000 and are less than $50,000, 3.375%.

(c) On the total gross revenues from toll business, if such gross revenues equal or exceed $50,000 and are less than $75,000, 3.938%.

(d) On the total gross revenues from toll business, if such gross revenues equal or exceed $75,000 and are less than $100,000, 4.5%.

(e) On the total gross revenues from toll business, if such gross revenues equal or exceed $100,000 and are less than $200,000, 5.063%.

(f) On the total gross revenues from toll business, if such gross revenues equal or exceed $200,000 and are less than $300,000, 5.625%.

(g) On the total gross revenues from toll business, if such gross revenues equal or exceed $300,000 and are less than $400,000, 6.188%.

(h) On the total gross revenues from toll business, if such gross revenues equal or exceed $400,000 and are less than $500,000, 6.75%.

(i) On the total gross revenues from toll business, if such gross revenues equal or exceed $500,000 and are less than $600,000, 7.313%.

(j) On the total gross revenues from toll business, if such gross revenues equal or exceed $600,000 and are less than $700,000, 7.875%.

(k) On the total gross revenues from toll business, if such gross revenues equal or exceed $700,000 and are less than $800,000, 8.438%, except that for the license fees assessed on May 1, 1988, the rate if gross revenues equal or exceed $700,000 and are less than $800,000 is 8.365% and except that for the license fees assessed on May 1, 1989, and thereafter the rate if gross revenues equal or exceed $700,000 and are less than $800,000 is 8.073%.

(L) On the total gross revenues from toll business, if such gross revenues equal or exceed $800,000, 9%, except that for the license fees assessed on May 1, 1988, the rate if gross revenues exceed $800,000 is 8.365% and except that for the license fees assessed on May 1, 1989, and thereafter the rate if gross revenues exceed $800,000 is 8.073%. (*As amended by Act* 29, *Laws* 1985; *Act* 27, *Laws* 1987, *effective August* 1, 1987.) [Comp. ¶ 80-402.]

JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-130

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WESTERN UNION CORPORATION,

Appellant,

v.

INDIANA DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF INDIANA

MOTION TO DISMISS OR AFFIRM

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NO. 88-130

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WESTERN UNION CORPORATION,

Appellant,

v.

INDIANA DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF INDIANA

MOTION TO DISMISS OR AFFIRM

The appellee, Indiana Department of Revenue, respectfully moves this Court to dismiss this appeal or affirm the judgment of the Court of Appeals of Indiana entered by that Court in Cause No. 73A01-8701-CV-1 on August 11, 1987. This motion is based upon two grounds: (1) that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument, and (2) that the question on which the decision of the cause depends has been previously determined by this Court and needs no further argument.

OPINIONS BELOW

The opinion of the Court of Appeals of Indiana is reported at 511 N.E.2d 481. A Petition For Rehearing was denied by the Court of Appeals of Indiana on September 29, 1987. The Supreme Court of Indiana denied Western Union's Petition For Transfer on April 22, 1988, and thus the Court of Appeals' opinion stands as final.

JURISDICTION

Appellant claims jurisdiction for this appeal based on 28 U.S.C. § 1257(2).

QUESTION PRESENTED BY THE APPEAL

Appellee does not accept the question as it is presented by Appellant, Western Union. The proper question presented is:

May a State, consistent with the Commerce Clause of the United States Constitution, divide certain telegraph services into intrastate and interstate segments and impose a tax upon the income derived from the intrastate parts of these telegraph services?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides in pertinent part that "The Congress shall have power * * * to regulate Commerce * * * among the several States * * *."

Indiana Gross Income Tax, Ind. Code 6-2.1-2-2, provides in pertinent part that:

> (a) an income tax, known as the gross income tax, is imposed upon the receipt of:
>
> * * *
>
> (2) the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana.

Indiana Gross Income Tax, Ind. Code 6-2.1-3-3 provides that:

> Gross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution.

STATEMENT OF THE CASE

Except for the conclusion that the exemption for interstate commerce should apply to the particular parts of Western Union's income which are in question, specifically the facility, access and equipment charges, appellee accepts Western Union's Statement of the Case at pages 4 through 7 of the Jurisdictional Statement.

REASONS FOR DISMISSING THE APPEAL OR AFFIRMING THE JUDGMENT BELOW

While the issue of interstate commerce and the protection from state taxation which Art. I, § 8, cl. 3 of the United States Constitution provides is unquestionably an issue of substance, in the context of this particular case the issue which Western Union seeks to have argued is not. This Court has stated the terms and guidelines upon which state taxation of activities within the general flow of interstate commerce will be permitted. This instance of state taxation comes within the standards for permitted taxation, and no substantial issue which requires further argument has been raised.

The requirements to sustain the tax are that it is: (1) applied to activity with a substantial nexus with the State; (2) fairly apportioned; (3) not discriminatory against interstate commerce; and (4) fairly related to the services provided by the State. *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978); *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79

S.Ct. 357, 3 L.Ed.2d 421 (1959); see also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

In this appeal, Western Union has incorrectly stated that the Indiana tax is unapportioned. Indiana has not taxed one hundred percent of the Telex and TWX income. While it is true that there was no mechanical formula used to calculate an apportionment percentage, the Indiana tax on Telex and TWX income received by Western Union from its Indiana subscribers was apportioned. As stated in the Jurisdictional Statement, page 5, the Telex and TWX charges have four separate charges billed. They are for equipment, facility, access, and usage. Western Union mentions only in passing the important fact that Indiana has conceded that ninety percent of the usage charge income is not taxable and then claims the Indiana tax is unapportioned because one hundred percent of the facility, access and equipment income from its Indiana subscribers has been taxed. Apportionment is accomplished by recognition of the income from the usage charge, which represents the charge for actually sending messages over the Western Union network, as ninety percent exempt. Indiana has limited its taxation to only the other three parts of Telex and TWX income, which are directly linked to this state. It is also significant to note that of these three, only the access charge necessarily applies to all customers. The equipment and facility charges are both only applied if certain additional items have been provided for the subscriber by Western Union.

Western Union argues that its network can not be segmented for tax purposes, but must only be considered as a whole. Its claim that any division of its network into segments for tax purposes is "artificial" is baseless. In cases such as *Dept. of Rev. v. Ass'n. of Wash. Steve.*, *supra.* and *Complete Auto v. Brady*, *supra.*, this Court has looked at only a "segment" of the interstate activity and has approved a state's taxation of that segment which occurs in that state. In the case of *General Motors v. Washington*, this Court held:

> . . . Although mere entry into a State does not take from a corporation the right to continue to do an interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a maze of local connections . . . and take advantage of its gain on domesticity, and still maintain that same degree of immunity.

General Motors v. Washington, *supra*, 377 U.S. at 448.

The question of whether or not a state may tax segments of activity which occur in that state is well settled. This case raises no new issue regarding this settled point of law for this Court to revisit.

Properly limited, the Indiana income tax on the equipment, access and facility charges which Western Union receives from its Indiana customers poses no real threat of multiple taxation. Western Union has also failed to show any actual multiple taxation or discrimination against interstate commerce. Where the taxpayer fails to demonstrate multiple taxation or a definite burden on interstate commerce, this Court has refrained from passing on the question. *General Motors v. Washington*, *supra.*, *Northwestern States Portland Cement v. Minnesota*, *supra.*

CONCLUSION

For all of these reasons, the appellee respectfully prays that this Court will grant this motion to dismiss or affirm the decision below.

Respectfully submitted,

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